marries, under the local Marriage Ordinance, a Christian woman; then on the principle applied in *Chetti* v. *Chetti*, the incidents of a monogamous marriage necessarily attaches. There ought to be equality in this matter, but if the Christian wife in the case supposed gave her husband cause for divorce, the Chinese non-Christian husband could not petition for dissolution under Chapter 84, because that Ordinance provides that the Court can only dissolve a marriage where the petitioner professes the Christian religion. As in the Colony both polygamy and monogamy are recognized, then, if a Christian woman enters into a connubial union with a non-Christian Chinese and that union is not solemnized under the Indian Marriage Act, it would appear that the incidents of a polygamous marriage attach to the union and not the incidents of a monogamous marriage.

This is a country of mixed population and marriages between persons not of the same race are certainly not rare events. Can it be said that the Indian Marriage Act renders such a union, if one party is a Christian, null and void unless in the form provided by the Act? To do so would necessitate giving a very extended meaning to the word "marriage". I do not think it would be right to give a universal meaning to the word "marriage" so as to include within it a status based on polygamy, especially in an enactment dealing with form and registration of Christian marriages, when, under the local law both polygamous and monogamous marriages may be valid for the purpose of establishing the legitimacy of offspring and the consequent rights of succession to property. All that the Act or the Ordinance, in my opinion, provides is that if the parties desire that their union shall afterwards be recognized as a valid Christian marriage, so that their matrimonial rights and the legitimacy of their offspring may be decided according to that law. they must have their contract solemnized in the proper form before the persons designated by the Act or Ordinance and registered in accordance therewith. Consequently there is in this case no marriage under the Act. But that does not affect the question whether a status has been acquired under Chinese law as recognised by the Court. I do not therefore accept the submission that the Indian Marriage Act prohibited Blanche as a professing Christian from making a contract such as is here in question.

In India there have been some variations in the decisions upon the effect of section 5 of the Indian Marriage Act, but in *Khambatta* v. *Khambatta* (1935) 59 Bombay 273, a case where a marriage between a Muslim man and a Christian woman was under consideration, it is stated at p. 304 that the Act (Indian Marriage) has been held to apply only to marriages in the Christian sense. The authority cited is *Emperor* v. *Maha Ram* (1918) 40 Allahabad 393, where Walsh J. analyses the effect of the 1872 Indian Act which for the purposes of this case are identical with the 1865 Act and our present Christian Marriage Ordinance and expresses the same view as I have set out here viz: "The Act does not prohibit even a professing Christian from marrying otherwise than under the Act if he wishes to do so."

There is however one point which could be raised even if the construction contended for by Mr. Koek were to be adopted and that is was Blanche a Christian i.e. "a person who shall profess the Christian religion" (section 5 Act of 1865). I have grave doubt as to whether this has been established in this case and would adopt the words of Knox J. in *Emperor* v. *Maha Ram* where at p. 402 he says "I am not prepared to hold that a person is a person professing the Christian religion within the meaning of Act No. XV of 1872 (the Act replacing the 1865 Act) simply because he is baptized as an infant when he has no possibility of saying to the world what is the faith to which he belongs, nor do I attach any particular value to the fact that he attended a Christian School."

In this case it would appear to be the fact that Blanche at 17 years of age had made no profession of faith and from then down to a few years ago made no profession of the Christian faith. I think on this ground also the section 5 is inapplicable.

Solicitor for Plaintiffs—*R. C. H. Lim.*

Solicitors for Defendants—*Chan & Eber.*

[APPELLATE CRIMINAL JURISDICTION]

McELWAINE, C.J.

April 26, 1939.

REX v. SAKANDAR KHAN.

[SINGAPORE MAGISTRATE'S APPEAL No. 24 of 1939]

Criminal Procedure Code (Cap. 27), s. 173 —Misjoinder of charges.

The appellant was convicted on two charges, first of accepting a bribe from a hawker contrary to s. 161 of the Penal Code; secondly of giving false information against another hawker alleging that the hawker had given him a bribe.

Held, that the mischief of s. 173 is to prevent unfairness or embarassment to the accused (1) by confusion of issues, (2) by introduction of evidence tending to shew that he is guilty of some other offence. If the offences were in the same transaction neither of such embarassments arises. The two offences in the present case had the relation of cause and effect. If the appellant had only been charged with one of the two offences, evidence of the other would have been admissible as being relevant to the issue. There had been no improper misjoinder.

Sanjiv Ratnappa v. *Emperor*, 1932 A.I.R. Bombay 545 followed.

Rex v. *Tan Chu Chooi*, 7 M.L.J. 230 not followed.

MAGISTRATE'S APPEAL.

A. J. Braga for appellant.

C. H. Butterfield, Crown Counsel for the Crown.

The facts and arguments appear sufficiently from the judgment.

Cur. Ad. Vult.

McELWAINE, C.J.—The appellant was convicted at one trial on two charges, the first of accepting a bribe contrary to section 161 of the Penal Code from an unknown hawker, and, secondly, that he gave false information against another hawker alleging that he had given him a bribe.

This second charge was adequately set out and particulars given, but the section under which it was laid was not contained in the charge as required by section 162 (4) of the Criminal Procedure Code. I think it probable that this second charge might have been laid under either section 182 or section 211 of the Penal Code. It has been treated throughout as being under the former section and as this section authorises a smaller penalty than that which might be imposed under section 211 the defect in this charge (which contained full particulars) did not prejudice the accused and may be disregarded under section 448 of the Criminal Procedure Code.

The evidence was amply sufficient to support each conviction. The only point of difficulty in the case is, was there misjoinder in trying these two charges together?

Section 173 of the Criminal Procedure Code enacts that for every distinct offence of which any person is accused there shall be a separate charge and every such charge shall be tried separately except in the cases mentioned in sections 174, 175, 176 and 179.

Mr. Braga argued that those are distinct offences, that none of the four sections mentioned in section 173 is applicable, and that on the authority of the decision of the Privy Council in *Subramania Ayyar* v. *Emperor*, I.L.R. 25 Mad., 61 the conviction must be quashed.

Mr. Butterfield did not dispute the proposition that the conviction must be quashed if there has been misjoinder contrary to section 173 but he argued that the offences formed the same transaction and so were properly joined under section 175. In the alternative he said the charges were properly joined under section 176.

Mr. Braga who alleged misjoinder referred to *Ali Hussain* v. *Emperor*, A.I.R. (1933) Cal., 308 in which Mallik J. said "To determine whether or not a series of acts would form parts of the same transaction the most important points to be considered are whether there was a common purpose and design and continuity of action." The mere fact that there may have been a common purpose does not constitute a transaction. *Krishnaji* v. *Emperor*, A.I.R. (1932) Bom. 277. In *Choragudi Venkatadri* v. *Emperor*, I.L.R., 33 Mad., 502 Abdul Rahim J. said "in a certain class of case community of purpose or design and continuity of action are essential elements of the connection necessary to link together different acts into one and the same transaction."

The expression "common purpose" appears to be used in a very wide sense in India. Thus in *Sanjiv Ratnappa* v. *Emperor*, A.I.R. (1932) Bom. 545, causing hurt to extort a confession contrary to section 330 of the Penal Code and altering a diary—forgery—in order to save the extorter from the consequences of his own acts, were held to be parts of the same transaction. Baker J. having referred to some decisions said "there must be continuity of action and purpose in order that the acts may form the same transaction."

The two offences in *Sanjiv's case* appear to me to have been committed for quite different purposes but they were obviously linked together. I would rather say that the first offence was the cause of the second, and I think it is for this reason that they formed the same transaction. This concealment or fabrication of evidence was, in some of the cases cited in *Sanjiv's case*, held joinable with the offence which gave rise to them, and I think it clear from the judgment in *Krishnasami Pillai* v. *Emperor*, I.L.R. 26 Mad., 125 that had there been such a connection between offences charged in that case the court would not have found misjoinder.

I think the matter is more correctly expressed by Chandavarkar J. in *Emperor* v. *Shurufalli Allibhoy*, I.L.R. 27 Bom. 135 where he said "The real and substantial test for determining whether several offences are connected together so as to form the same transaction depends upon whether they are so related to one another in point of purpose, or (I stress 'or') as cause and effect, or as principal and subsidiary acts, as to constitute one continuous action."

I doubt, however, the correctness of the word 'continuous.' In *Sanjiv's case* for example, there was no idea of committing the second offence until investigation into the first had begun. It was an after-thought but nevertheless directly connected with the first offence.

Mr. Butterfield also relied on section 176 of the Criminal Procedure Code and it appears to me that *Bagu* v. *Emperor*, L.R. 52 Ind. App. 191 lends some support to this contention. But I think *Bagu's case* also supports the view that the two offences murder and concealment could have been the same transaction. The accused were charged under section 302, they were convicted under section 201 and the basis of the appeal was that no charge had been laid under 201—not that no charge could have been laid under that section. *Bagu's case* was, however, decided under sections 236 and 237 of the Indian Criminal Procedure Code, corresponding to sections 172 and 173 of the Colony Code.

I would venture to put it this way. Section 173, 174, 175, 176 and 179 must be considered together. Section 173 is the dominant section, the other sections state what is not within the mischief of section 173.

The mischief of section 173 is to prevent unfairness or embrassment to the accused (1) by confusion of issues, (2) by introduction of evidence tending to shew that he is guilty of some other offence.

If the offences are in the same transaction, neither of these embarrassments arise. The two offences in the present case have the relationship of cause and effect. If the appellant had only been charged with one evidence of the other would have been admissible as being relevant to the issue otherwise than by proving bad character and once that can be done and if confusion of issues does not arise, I think the charges are taken out of the mischief of section 173.

I think this relevance of the evidence of the other offence supplies the nexus or shews the relationship of cause and effect between the two offences and shews them to form part of the same transaction.

As this latter reason is perhaps not consistent with a passage in the Judgment in *Rex* v. *Tan Chu Chooi*, 7 M.L.J., 230, I prefer to rest my judgment on *Sanjiv Ratnappa* v. *Emperor*, *(supra)* in which it has been held that fabricating or destroying evidence was an offence in the same transaction as the offence which the second offence was intended to conceal.

In my opinion there was no misjoinder and the appeal is dismissed.

Appeal dismissed.

[APPELLATE CRIMINAL JURISDICTION]

HOWES. J.

April 28. 1939.

REX v. YOON CHOON PAWNSHOP AND OTHERS.

[PENANG CRIMINAL APPEAL No. 35 of 1938]

Pawnbrokers Ordinance (Cap. 216), s. 27 —Delivery of property unlawfully pawned.

A firm of jewellers, I.B. Limited, employed K. as a salesman and they handed to him certain articles of jewellery to be sold by him on their behalf at certain prices stipulating that the property in the said goods was to remain in the company until the said prices were paid to the company. The salesman K. thereafter handed some of the articles to one Y. whom he had previously employed as a broker for purposes of sale and he took from Y. receipts in which the articles were stated as having been received from I.B. Limited, each receipt being marked "for approval." Y., while ostensibly agreeing to the trust which he secretly intended to disregard took the articles and at once pawned them with various pawnbrokers.

Held, that Y. was a mercantile agent and that he was acting in the ordinary course of business of a mercantile agent and accordingly he had power to sell the jewellery. That an agent who had been entrusted with the power of sale had also got the lesser power to pledge the articles and that therefore the pawnbrokers had good titles and that the jewellery should only be delivered to I.B. Limited on payment by them to the pawnbrokers of the amounts paid by the pawnbrokers to the pledger in each case.

CRIMINAL APPEAL.

R. D. Hume for pawnbrokers.

T. E. Conaghan for I. B. Limited.

Cur. Ad. Vult.

HOWES, J.—This is an appeal from an order made by the District Judge, Penang, ordering the return to Ipekdjian Brothers Ltd. of certain jewellery which had been pledged with the appellants.

The learned District Judge found that Messrs. Ipekdjian Brothers Ltd. were still the owners of the jewellery, and he consequently, after holding an inquiry under Section 435 of the Criminal Procedure Code (which deals with the disposal of property produced before the Court, regarding which an offence appears to have been committed), made an unconditional order for it to be returned to them, under Section 27 of the Pawnbrokers Ordinance.

The facts are very simple. Ipekdjian Brothers Ltd. employed one Khoo Sian Tat as a salesman (but who also acts as a broker for them) at 140A Malacca Street, Penang.

On 10th May 1938, as evidenced by Consignment Note No. 5 (Exhibit "G") Ipekdjian Brothers Ltd. handed to Khoo Sian Tat certain jewellery "to be sold by him at a price not less than the amount set out opposite each item of goods; and either such price of same or the goods are to be returned on demand by the Company, and the property in the said goods shall remain in the Company until the said price is paid to the Company." The District Judge found that Khoo Sian Tat was a mercantile agent.